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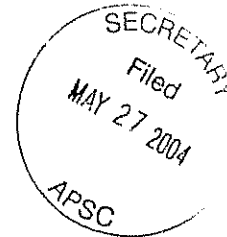
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May 27, 2004

**VIA HAND DELIVERY**

Walter Thomas, Secretary  
Alabama Public Service Commission  
100 N. Union Street - 8<sup>th</sup> Floor  
RSA Union Building  
Montgomery, AL 36104



**Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc.  
with BellSouth Telecommunications, Inc., Pursuant to the  
Telecommunications Act of 1996 - Docket No. 28841**

Dear Mr. Thomas:

Enclosed are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Reply to Comments of CompSouth on Issue 25 of the Arbitration Panel's Recommendation. Please distribute as needed and return a stamped copy of the cover letter to my office in the envelope provided.

Thank you for your assistance in this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "F. Semmes".

Francis B. Semmes

FBS/mhs  
Enclosures

cc: Honorable John Garner, ALJ (via hand delivery)  
Honorable Mark Montiel, Esq. (via overnight mail)  
Honorable Terry Butts, Esq. (via overnight mail)  
Honorable James E. Wilson, Esq. (via overnight mail)  
Mr. Darrell Baker, Director (via hand delivery & email)  
Mr. Larry Smith, Supervisor (via hand delivery & email)  
Parties of Record

5/27/2004  
copy to  
Comm  
a. s. j.  
legal  
Mark Montiel  
Jim Wilson  
Terry Butts

**BEFORE THE  
ALABAMA PUBLIC SERVICE COMMISSION**

In Re:	)	
	)	
Petition for Arbitration of ITC^DeltaCom	)	Docket No. 28841
Communications, Inc. with BellSouth	)	
Telecommunications, Inc., Pursuant to the	)	
Telecommunications Act of 1996	)	
_____	)	

**BELLSOUTH'S REPLY TO COMMENTS OF COMPSOUTH ON ISSUE 25**

BellSouth Telecommunications, Inc. ("BellSouth"), by and through its undersigned counsel, files its Reply to Comments filed by Competitive Carriers of the South, Inc. ("CompSouth"). On May 5, 2004, the Alabama Public Service Commission ("Commission"), pursuant to Rule T-26(I)(2), requested comments from non-parties on the Recommendation issued by the Arbitration Panel. CompSouth filed its Comments on May 17, 2004, devoted entirely to Issue 25 in the arbitration Recommendation. BellSouth replies to those Comments below.

**I. Issue 25**

Issue 25 in the Arbitration is as follows:

Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end-user on the same line?

**II. Preliminary Statement Regarding CompSouth's Comments**

Although the Comments were filed by CompSouth, ITC^DeltaCom Communications, Inc. ("DeltaCom") is a member of CompSouth. Consequently, BellSouth is placed at a significant disadvantage procedurally by the CompSouth filing. First, DeltaCom will be getting

two bites at the apple, so to speak, in that it can “comment” on this Issue in addition to filing its Exceptions. BellSouth does not have that luxury in responding to the issues to which it takes exception. Second, and much more seriously from a point of due process, DeltaCom, through CompSouth, has taken the opportunity to present additional testimonial “evidence” (even though it is not that) on a contentious issue that was presented at the arbitration hearing, testimony that BellSouth will not be able to cross-examine.

As BellSouth pointed out in its Post-Hearing Brief, DeltaCom was unable to present any probative evidence that *any* Alabamian has been “harmed” by BellSouth’s policy of not providing unregulated BellSouth® FastAccess® DSL service (“FastAccess”) to a DeltaCom UNE-P customer. See BellSouth Post-Hearing Brief, pp. 34-35. CompSouth, now, nearly a year after the hearings in this matter, presents unsworn and unverified “evidence” about the numbers of customers that one competitive local exchange carrier (“CLEC”) has allegedly lost because of BellSouth’s policy. This is the equivalent of “friendly cross-examination” at a hearing. If the Commission does not disregard this late-filed, unsworn “evidence,” BellSouth will be placed at yet another significant disadvantage in a case that has been full of disadvantages.<sup>1</sup>

### **III. CompSouth’s Comments are Based on an Erroneous Premise.**

CompSouth’s Comments are based entirely on a false premise that it repeats throughout its filing. CompSouth states, for example, that the Commission “has already concluded that it has jurisdiction to address BellSouth’s DSL practice. . . .” CompSouth Comments, p. 1. Further,

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<sup>1</sup> In its new “evidence,” which comes unassociated with an affidavit or explanation of the methodology employed to arrive at the figure, CompSouth alleges that MCI “lost” 123 customers from May 1 through May 11 in Alabama due to BellSouth’s policy. CompSouth further states at p. 4 of its Comments that, “at that rate, just one CLEC would lose 335 local lines per month . . .” Without waiving its objection to the introduction of CompSouth’s “evidence” and in an abundance of caution, BellSouth submits that during the same period, BellSouth lost 1,691 lines to MCI. Using CompSouth’s arithmetic, BellSouth would lose 4,611 lines to MCI during the month, thirteen times the number of customers that MCI alleges that it is losing. (This does not factor in the effect of MCI’s policy of not selling its Internet access service to non-MCI voice customers. See p. 8, below.) Given these figures, it does not appear that “ITC^DeltaCom and other CLEC members of CompSouth are losing local customers in Alabama because of BellSouth’s policy.” CompSouth Comments, p. 4.

at p. 2, CompSouth states, “Ignoring this Commission’s previous conclusion that states do have jurisdiction to address BellSouth’s practice. . . .” CompSouth further states that “Facilitator Mark Montiel pointed out that the Commission has taken the position in favor of state jurisdiction in comments that it filed in proceedings before the [Federal Communications Commission (“FCC”)] on January 30, 2004.” And so on.

The “comments” to which CompSouth so often refers, and upon which it almost exclusively relies, were appended to the dissent in the Panel Recommendation. CompSouth--and Facilitator Montiel--urge that, through the “comments,” the Commission has already decided this matter. Apparently relying on the doctrine of *stare decisis et non quieta movere*,<sup>2</sup> CompSouth avers that the Panel’s Recommendation on Issue 25 “flies in the face of the Commission’s previously stated position and therefore should be rejected,” (CompSouth Comments, p. 2), that the “comments” are “the stated policy of the Commission,” (Id. at 3), and that the Recommendation “flatly contradict[s] the Comments that the Commission filed with the FCC.” (Id. at 7). CompSouth is wrong, and it knows (or should know) it.

As most law students learn in their first year, the doctrine of *stare decisis* is the doctrine of precedent, “under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” See *Black’s Law Dictionary*, p. 1414. One of the bases of the doctrine, however, and one that is missing from this situation, is that the “comments” were not a decision, nor did they follow from a Commission action taken in a judicial, quasi-judicial, or litigation setting.

Though styled “Comments of the Alabama Public Service Commission” in WC Docket No. 03-251 before the FCC, the document was not a “decision” that was arrived at in a judicial

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<sup>2</sup> Literally, “To stand by things decided and not to disturb settled points.” See *Black’s Law Dictionary*, 7<sup>th</sup> ed. (West 1999) (“Black’s Law Dictionary”), at p. 1414.

or quasi-judicial proceeding. Indeed, there was no proceeding at all.<sup>3</sup> The document was not signed by the Commission or any of the Commissioners, nor was it attested to by the Secretary of the Commission. There is no indication that the Commission, or any of the Commissioners, saw the Staff Comments, deliberated over them, or approved them. There is no indication, as required by Section 37-1-8 of the *Code of Alabama*, that there is a record of any proceeding in which the document or the “position” was considered. The Staff Comments were issued prior to the Commission’s consideration of this evidentiary proceeding.

Nor are the Staff Comments an order of the Commission. An order, as noted above, that affects any rate or service of a utility cannot be made unless a public hearing has been held. No such hearing was held.<sup>4</sup> Furthermore, the Staff Comments do not “affect” any utility, because, as far as BellSouth is aware, no certified copy of the document was delivered to any utility. See Code §37-1-98.

The Commission should view the Staff Comments for what they are—a hearsay statement,<sup>5</sup> prepared and signed not by the Commission but by a member of the Commission staff, in response to a request by a NARUC official for support of NARUC’s position in a

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<sup>3</sup> As the Commission is aware, the document was prepared and signed by a Commission Staff member during a period that the Commission was not in session. Consequently, BellSouth refers to the document as the “Staff Comments.” Because the Staff Comments were not prepared in conjunction with any official proceeding—and it is beyond doubt that the Commission can make no order affecting any rate or service of a utility until a public hearing, with notice and an opportunity to be heard, has been held, see Code §37-1-96—they do not have the force of law, nor do they enjoy any presumption of validity. See Code §37-1-99 (only duly issued orders have any presumption of validity).

<sup>4</sup> Indeed, if the Staff Comments are held to be the policy of this Commission, BellSouth’s rights to due process have been abrogated. The alleged “policy” would have been adopted apart from the very proceeding in which the issue was being litigated—this one. Furthermore, if the Staff Comments are Commission policy, it was adopted before BellSouth was permitted, in an existing contested proceeding, to present and argue its position before the Commission. This would be prejudice in the literal sense of the word—the outcome of this proceeding would have been “pre-judged” by the Commission in violation of the Code of Alabama and any notion of fairness and due process.

<sup>5</sup> Hearsay is, generally speaking, an out-of-court statement, not made under oath, made by someone other than the declarant, offered for the truth of the matter asserted, without the then-opportunity to cross-examine. See generally, Ala. R. Evid. Art. VIII. The definition fits the Staff Comments.

contested matter, during a period when the Commission was not in session, without the benefit of testimony and cross-examination, and issued without the protections of due process of law accorded to persons potentially affected thereby. The Commission does not decide cases or form policy in this fashion, and for CompSouth to assert that the Staff Comments are precedential (or even persuasive) is the height of wishful thinking.

This, though, is the foundation upon which CompSouth's Comments are based. In contrast to the hastily-prepared and conclusory Staff Comments, there *is* a decision to which the doctrine of *stare decisis* should apply—the Commission's order on BellSouth's 271 application—and it observes that BellSouth does not have to split the line to provide its DSL service over a UNE-P facility:

We [i.e., the Alabama Public Service Commission] note that BellSouth is correct in pointing out that the FCC held in its local competition order that once the loop and port are used to provide line splitting as opposed to simple voice arrangements, **the UNE-P no longer exists** because the arrangements are fundamentally different.

*Order* dated July 11, 2002, Docket No. 25835, p. 209 (emphasis supplied). Thus, the argument over Issue 25 is entirely academic, because the UNE-P does not exist in DeltaCom's and CompSouth's scenarios.

Finally, while CompSouth focuses solely on the tension between the Panel Recommendation (which, not incidentally, was reached after the test of testimony, evidence, cross-examination, and briefing) on the one hand and the Staff Comments (which were not) and the dissent (which relies on the Staff Comments) on the other, CompSouth does not even attempt to rebut the Panel's conclusion that federal law, FCC decisions, and Commission precedent obligate the Commission to find for BellSouth on Issue 25. That is because CompSouth *cannot* refute the Panel's conclusion.

#### IV. BellSouth's Policy is Pro-Competitive, not Anticompetitive.

Today's broadband market is highly competitive.<sup>6</sup> Cable companies, satellite companies, local telephone companies, and data-providing CLECs such as Covad, have invested large amounts of capital to deliver high speed Internet connections to consumers. Additionally, Alabama Power Company is currently trialing broadband over power lines ("BPL") in a Birmingham community, presenting the possibility that another major player may enter the marketplace.

Companies such as those that are members of CompSouth that wish to meet consumer desire for broadband products have a number of avenues they can pursue:

- They can invest in technology and deploy service like cable, telephone, satellite, facilities-based broadband providers, or potentially electric power companies (apparently like MCI has done, for example, *and how DeltaCom has already done in Alabama* (Tr. 1073);
- They can seek partnerships with such facilities-based providers (like the AT&T/Covad arrangement); and
- They can resell BellSouth's local telephone service in conjunction with BellSouth's broadband product, as several companies have done<sup>7</sup>

Notwithstanding all these options, CompSouth asserts that BellSouth's policy of not selling its retail broadband product to CLEC customers where the CLEC purchases the UNE-P to

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<sup>6</sup> A fundamental flaw in DeltaCom's, CompSouth's, and the dissent's analysis is that there is no standalone "DSL market" of which BellSouth is aware. BellSouth has chosen to compete in the **broadband market** using DSL technology. DeltaCom and CompSouth members can choose to participate in that market using whatever technology that they wish. But BellSouth is aware of no broadband supplier that has entered the market with zero capital at risk, as DeltaCom and CompSouth members wish the Commission to enable them to do.

<sup>7</sup> DeltaCom and CompSouth complain that resale is not a viable strategy for them and that "resale has not been used successfully anywhere in the U.S." The truth of the matter is that DeltaCom and CompSouth members are more interested in the 50-60% UNE-P discount than taking a 16.3% resale discount and delivering a customer a complete package of services. It bears repeating that the choice to be exclusively a UNE-P-based supplier (with its regulatorily-mandated higher margins) comes with consequences.

serve that customer is anti-competitive. Because CompSouth's members are unwilling or unable to pursue any of a number of options available to them, they would have this Commission impose on BellSouth additional regulatory burdens in order to accommodate their wishes. Such increased regulation will hamper BellSouth's ability to compete in the broadband market against the other *unregulated* facilities-based providers noted above.

In truth, it is CompSouth's members' position on this issue that is anti-competitive. They wish to be shielded from the consequences of their business strategy. Cable, telephone, satellite, and power companies are finding ways to add broadband to their product set. Instead of pursuing a strategy of investment or partnership, CompSouth and its members have decided to pursue a strategy of state regulatory fiat and regulatory welfare, notwithstanding the FCC's repeated refusals to assist them. In fact, the FCC has expressly concluded that forcing BellSouth to offer broadband service is not competitive. Rather, competition and consumers benefit if CLECs have incentives either to develop competing broadband service themselves or to "partner[]" with another competing provider "to take full advantage of an unbundled loop's capabilities." Report and Order, CC Docket 01-338, 18 FCC Rcd 16, 978, at 17,141.

Lost in all the rhetoric is the evidence at the hearing, which showed that more than 97% of BellSouth's customers in Alabama do NOT subscribe to FastAccess service. (Tr. 1458-59) **Thus, DeltaCom can use UNE-P to compete for 97% of BellSouth's customers.** This matter is only an issue with, at maximum, three per cent of BellSouth's customers. If it were *really* interested in competing for the marginal three per cent, DeltaCom could offer this subset of customers resold lines, or use any number of other arrangements. It refuses to do so, for reasons that may very well be driven by its business model. But choosing that inflexible business model



has consequences, and the Commission should not be in the business of choosing between business models in an unregulated market.

The allegation that BellSouth's practice is anti-competitive is completely undermined by one of CompSouth's most prominent members—MCI—which has an identical policy. Consumers interested in MCI's high speed Internet service must also subscribe to MCI's local service, "The Neighborhood." See the attached section from the MCI website under "Help and FAQ":

**» Can I order high speed Internet service without local service?**

**» No, you must have local service with The Neighborhood in order to be eligible for high speed Internet service.**

Attachment 1, at page 9 of 17.<sup>8</sup> MCI probably has valid business reasons for its policy, just as BellSouth has valid business reasons for its policy. It is, however, disingenuous for CompSouth to argue that BellSouth's policy is anticompetitive while its members have the same policy.

In attacking BellSouth's DSL policy as anti-competitive, CompSouth alleges that the policy does not, as BellSouth states, promote the build-out of BellSouth's DSL facilities.

CompSouth further alleges that BellSouth's "argument is particularly weak in Alabama" (p.5) because:

... the Commission has permitted BellSouth to use more than \$50 million in federal universal service funds to implement carrier serving areas ("CSAs"), which effectively shorten copper loop lengths and permit BellSouth to provide DSL to customers served in those areas. BellSouth thus is using universal service fund money to wall off an expanding base of DSL customers from local voice competition. To make matters worse, under the *Triennial Review Order*, CLECs would be limited to using the narrow band

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<sup>8</sup> For space considerations, the Attachment consists of pages 1-3 and 9 of 17 pages in the document. The upshot of MCI's policy is that BellSouth is at a disadvantage in competing for MCI's voice customers.

portions of these CSA loops, which would effectively prevent CLECs from providing these customers with their own DSL service.

As explained earlier, the only thing preventing CLECs from providing customers with their own DSL service is the CLECs – by choosing not to invest in the equipment and facilities required to provide customers with their own DSL, by choosing not to resell BellSouth's voice service and permit customers to retain BellSouth's FastAccess Service, or by choosing not to partner with a data LEC, such as COVAD. Because CompSouth is attempting to allege that BellSouth is somehow misusing federal universal funds to wall off competition from CLECs, however, BellSouth will address CompSouth's attack on the use of universal service funds.

The FCC has implemented the requirements of the Act in a series of orders in CC Docket No. 96-45. Of particular importance in the instant proceeding is the FCC's *Ninth Report & Order and Eighteenth Order on Reconsideration*, Adopted October 21, 1999 and Released November 2, 1999, in which the FCC established various requirements and procedures by which carriers were to use the federal universal service support.

Regarding how carriers, such as BellSouth or CLECs who are designated as eligible telecommunications carriers ("ETCs"), may use federal universal funds and the role state commissions are to play, the FCC stated the following:

... federal universal service high-cost support... is an appropriate mechanism by which to ensure that non-rural carriers use high-cost support only for the "provision, maintenance and upgrading of facilities and services for which the support is intended," in accordance with section 254(e) of the Act. (para.95)

A state could also require carriers to use the federal support to upgrade facilities in rural areas to ensure that services provided in those areas are reasonably comparable to services provided in urban areas of the states. (para. 96)

As a regulatory safeguard, however, we adopt rules in this Order requiring states that wish to receive federal universal service high-cost support for non-rural carriers within their territory to file a certification with the Commission stating that all federal high-cost

funds flowing to non-rural carriers in that state will be used in a manner consistent with section 254(e). (para. 97)

To ensure that non-rural carriers comply with section 254(e), we do not believe that a non-rural carrier in a particular area should receive federal forward-looking support until the Commission receives and appropriate certification from the state. (para. 98)

As acknowledged by CompSouth, BellSouth has filed proposals for the utilization of federal high-cost universal service support for a number of years in Alabama. Each year, sometimes with minor modifications, the Commission has approved BellSouth's proposals and has certified the proposed use of those funds with the FCC as being in compliance with section 254(e). BellSouth has included the CSA design in each year's proposal and the Commission has certified BellSouth's proposal with the FCC. It is important to be clear, however, that BellSouth has never proposed, the Commission has never certified, and BellSouth has never spent, federal high-cost universal service funds on either advanced services or information services. Not one dime of those funds has been spent to equip any line with DSL. The funds have been spent to upgrade the basic, circuit-switched, network infrastructure in the high-cost areas of the State - areas identified by the FCC's methodology.

Regarding CompSouth's assertion that the CSA design in conjunction with the impact of the *Triennial Review Order* prevents its members from providing their own DSL service to their customers, CompSouth is simply wrong. As pointed out to the North Carolina Utilities Commission in Docket No. P-55, Sub 1457, the following ten (10) alternatives are available to CLECs for serving the broadband needs of their customers.

- 1) A CLEC could place its own DSLAM at the Digital Loop Carrier remote terminal;
- 2) A CLEC could build its own loop facilities or lease loop facilities for a third party;
- 3) A CLEC could provision its end user customer with ISDN service;
- 4) A CLEC could partner with a cable broadband provider to provide cable modem service;
- 5) A CLEC could purchase BellSouth's tariffed wholesale DSL offering (from the interstate tariff;

- 6) A CLEC could purchase and maintain BellSouth's copper facility;
- 7) A CLEC could lease BellSouth's copper facility on a time and materials basis;
- 8) A CLEC could deploy a fixed wireless broadband facility;
- 9) A CLEC could partner with a satellite broadband provider; or
- 10) A CLEC could serve its end user customer via a T1 line.

As should be evident from the above, CompSouth is simply crying wolf in the hopes that the Commission will take pity on its purported plight – a plight that is entirely of its own making.

**V. The Commission Does Not have Jurisdiction to Regulate FastAccess Service or BellSouth's Interstate DSL Transport Service.**

The services potentially at issue here are two: BellSouth's retail information service offering, FastAccess (which is delivered via digital subscriber loop ("DSL") technology), and its underlying wholesale Internet transport service. The Commission has jurisdiction to regulate neither service.<sup>9</sup>

First, FastAccess is, as admitted by DeltaCom, an information service (Tr. 1057) that is not regulated by this Commission. (Id.) Indeed, the FCC has acknowledged that Congress has dictated that information services, as a matter of federal law policy, must be free of regulatory entanglements by state commissions. See *In re Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd. 7571 (1991).

Second, the underlying transport service is a *jurisdictionally interstate* telecommunications service, and one that BellSouth has tariffed at the federal level. See *In re: BellSouth FCC Tariff No. 1*, Memorandum Opinion and Order, FCC 98-317, at ¶1. This Commission simply does not have the power to regulate an interstate service (and to change its

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<sup>9</sup> CompSouth erroneously asserts that the Panel's recommendation was made "primarily on jurisdictional grounds." Comments, p. 2. Although BellSouth agrees that the jurisdictional issue is totally dispositive of Issue 25, that was not the primary ground of the Panel's Recommendation. Indeed, the jurisdictional discussion in the Recommendation occupied a little over one paragraph of a six-page analysis. More central to the Recommendation were the conclusions that the FCC, three state commissions in the BellSouth region, and one federal district court have held that BellSouth's practice is not anticompetitive; that DeltaCom has made business choices that have the consequence that it has not deployed its own DSL service or chosen to partner with a DSL provider; and that a ruling against BellSouth's position would be a huge disincentive to investment in competitive broadband facilities.

terms, which is what DeltaCom is trying to accomplish) that is governed by the terms of a federal tariff.

In this regard, the relief that CompSouth seeks is very telling. That relief—that the Commission should prohibit “BellSouth . . . from charging different prices to its DSL customers based on whom the customer selects as its local voice carrier”<sup>10</sup>—would without a doubt be direct regulation of the price of an information service or federally-tariffed telecommunications service by this Commission. CompSouth has boiled the issue down eloquently and put it very plainly and in simple, easily-comprehensible terms—it wants the Commission to directly regulate, *even as to price*, that which it has no power to regulate. The Commission should not be led down this primrose path.

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<sup>10</sup> Comments, p. 11. CompSouth conveniently ignores the facts that this is a two-party arbitration, that DeltaCom did not seek this relief in the pleadings and it was not the subject of the hearing, it is not a party to this case, and is not entitled to any relief whatsoever.

## **VI. The Panel's Recommendation On Issue 25 Is Correct and Should Be Adopted.**

The Panel's recommendation on Issue 25 is supported by the facts presented at the hearing and by the law cited by BellSouth and appropriately analyzed by the Panel. Despite the emotional analysis in the dissent and in the decisions cited by Facilitator Montiel, the fact is that the FCC has ruled on several occasions and in several different ways that incumbent local exchange carriers do not have to provide their DSL broadband offerings over the UNE Platform. This Commission, in BellSouth's 271 case--a case that involved live testimony, cross examination, and extensive briefing (in short, a quasi-judicial proceeding)—recognized that fact, by pointing out that BellSouth correctly noted that once the voice line is split to permit one company to provide voice service and the other to provide broadband, “the UNE-P no longer exists.” BellSouth 271 Order, p. 209. It is *this* Order to which the doctrine of *stare decisis* applies, not to the Staff Comments that were hastily filed during a Commission recess period.

The dissent likewise relies heavily, almost exclusively, on the Staff's Comments before the FCC. As demonstrated above, the effect of the Staff Comments is neither controlling nor persuasive.<sup>11</sup> The dissent repeatedly alleges that the “Commission found” this or the “Commission found” that. The Commission “found” nothing. The dissent also cites the comments filed by NARUC before the FCC, but that citation adds nothing to the equation. The Staff Comments essentially repeated what NARUC said, and NARUC is, of course, not an impartial fact-finder or a judicial or quasi-judicial body.

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<sup>11</sup> In addition to the procedural infirmities noted above, the Staff Comments were wholly conclusory in nature and devoid of analysis. For example, the Staff Comments state: “A state requiring an [ILEC] to provide DSL service to customers who chooses [sic] to obtain local voice service from another carrier does not impose state regulation on interstate information services.” Staff Comments, pp. 1-2. That is a conclusion, not analysis, and it is an illogical and uninformed conclusion to boot.

The dissent suffers from another flaw: it employs a now-discredited analysis of BellSouth's obligations under §252 of the Act. As Facilitator Montiel put it in arguing for forced provision of a retail service by means of an arbitration ruling, "[I]t is technically feasible for BellSouth to provide this service." Dissent, p. 1.<sup>12</sup> But Facilitator Montiel applied the wrong standard—as the FCC clearly said at paragraph 366 of the Triennial Review Order in rebuking the use of the "technically feasible" standard in connection with unbundling:

**The standard for unbundling is not "technical feasibility"** and, moreover, just because a facility is capable of being unbundled does not mean that it is appropriately considered to be a network element for purposes of section 251(c)(3).

Finally, both the CompSouth Comments and the dissent rely on three state commission rulings that are contrary to BellSouth's position. But CompSouth and the dissent both fail to mention that three state commissions—North Carolina, South Carolina, and Tennessee—and one U.S. District Court (the Southern District of Florida, in a decision that applied a recently-developed United States Supreme Court case that the Kentucky court cited by the dissent apparently did not have the benefit of) have held that BellSouth's practice is not anticompetitive. The three state commission decisions have also ruled that the FCC's decisions do not support the result urged by CompSouth, DeltaCom, and the dissent.<sup>13</sup> Finally, neither CompSouth nor the dissent mentions the following:

- The Florida Public Service Commission ruling was appealed to the United States District Court for the Northern District of Florida, and that appeal has been stayed by order issued February 24, 2004.

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<sup>12</sup> As BellSouth noted in its exceptions to other issues in this arbitration, §252 of the Act, under which this arbitration is conducted, makes no provision whatsoever for the Commission to compel a party to provide a *retail* service. This is a case about a *wholesale* agreement

<sup>13</sup> The South Carolina Commission (IDS arbitration, Docket No. 2001-19-C), the Tennessee Regulatory Authority (DeltaCom arbitration, transcript of deliberative proceedings, January 12, 2004), and the North Carolina Utilities Commission (in BellSouth's 271 case) have all ruled that BellSouth is not required to continue to provide its DSL service over a UNE-P loop. (Issue 25 is currently pending before the NCUC in its DeltaCom arbitration.)

- The Georgia MCI complaint case was appealed to the United States District Court for the Northern District of Georgia, and that appeal has been stayed by order dated March 8, 2004.
- The Kentucky PSC arbitration order and the order of the United States District Court for the Eastern District of Kentucky have been appealed to the United States Court of Appeals for the Sixth Circuit, which granted a motion to stay the appeal on March 3, 2004.
- The Louisiana PSC decision was appealed to the United States District Court for the Middle District of Louisiana, where the Court entered a stay on April 6, 2004.

Thus, there is not a final, unappealable order holding that BellSouth's DSL over UNE-P policy is anticompetitive or that it must change its policy. Citation to any of those decisions is misplaced.

## VII. Conclusion

For the reasons stated above, the Commission should disregard the Comments of CompSouth and should enter an order adopting the Recommendation of the Panel on Issue 25.

Respectfully submitted this 27<sup>th</sup> day of May, 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.




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ITS ATTORNEYS



### CERTIFICATE OF SERVICE

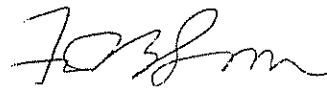
This is to certify that I have this day served a copy of the foregoing BellSouth's Reply to Comments of CompSouth on Issue 25 on the parties of record, by depositing same in the United States Mail, postage prepaid on this the 27th day of May, 2004.

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FRANCIS B. SEMMES

# The Neighborhood

built by MCI

ATTACHMENT **1**

► Consumer Home  
► MCI Home

Home

Features  
& BenefitsCheck Pricing  
& Sign UpSpread  
the WordHelp  
& FAQYour  
Account

## How can we help you?

When you have an offer as great as The Neighborhood a lot of people want to know more about it. So to make things easier, we've provided the answers to the most frequently asked questions about The Neighborhood. If you don't see your questions here, you can also [e-mail us](#) and we'll send you an answer within 4 hours.

### Questions about The Neighborhood

- [Is there a number I can call to get help signing up for The Neighborhood?](#)
- [What does The Neighborhood offer that my local provider doesn't?](#)
- [What features, like Call Waiting, does The Neighborhood offer?](#)
- [Does The Neighborhood offer Voicemail?](#)
- [How do I refer someone to The Neighborhood?](#)
- [Can I keep my current phone number?](#)
- [What is Neighbor-to-Neighbor calling?](#)

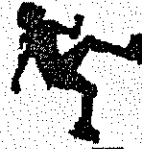
### Questions about service

- [What is the benefit of getting both local and long distance service from The Neighborhood?](#)
- [Will I have to pay a fee to switch my service to The Neighborhood?](#)
- [How long will it take for my Neighborhood service to be established?](#)
- [How will I know when my Neighborhood service has been established?](#)
- [I have DSL with my current local telephone provider. What will happen to my DSL service when I switch to The Neighborhood?](#)
- [Where is The Neighborhood currently being offered?](#)
- [Does the Neighborhood offer discounted rates for low-income](#)

For more information call 1-877-777-6271

Add high speed Internet service  
for as low as **\$19.99 a month!**  
Enjoy the web without the wait

► [VIEW DEMO](#) ► [CHECK AVAILABILITY](#)



customers?

## Questions about high speed Internet service

- ▶ What is high speed Internet service?
- ▶ What are the advantages of high speed Internet service?
- ▶ Is my high speed Internet service speed guaranteed?
- ▶ Can I talk on the phone and use high speed Internet service at the same time?
- ▶ Can I connect my computer and still use my same phone line?
- ▶ Can I connect my high speed Internet service to all of the computers in my home?
- ▶ What are DSL filters?
- ▶ How can I get additional DSL filters?
- ▶ I lost the Quick Start Guide that came with my high speed Internet self-installation kit. How can I get another copy?
- ▶ What is included in high speed Internet service?
- ▶ Does high speed Internet service provide a dynamic or static IP address?
- ▶ Does high speed Internet service include Firewall or Anti-Virus software?
- ▶ Can I order high speed Internet service without local service?
- ▶ Is there a separate high speed Internet service agreement?
- ▶ Am I always connected to the Internet?
- ▶ Will I get busy signals when trying to connect to the Internet?
- ▶ Where is high speed Internet service currently available?
- ▶ How long will it take to establish my high speed Internet service?
- ▶ How will the high speed Internet equipment connect to my computer?
- ▶ What is a self-installation kit?
- ▶ Can I move my high speed Internet service to multiple phone jacks within my home?
- ▶ If my DSL modem fails or loses power, do I lose phone service?
- ▶ Do I get e-mail with high speed Internet service?
- ▶ What are Spam Blocker and Web Mail?
- ▶ Will my current phone features work with high speed Internet service?
- ▶ How does DSL compare to dial-up/cable connections?
- ▶ What are the minimum system requirements for high speed

#### Internet service?

- ▶ What happens to my high speed Internet service if I move?

### **Questions about Voicemail and other features**

- ▶ What will happen to my current Voicemail box when I sign up for the Neighborhood? Will I experience a delay?
- ▶ How do I access my Voicemail?
- ▶ Do I need a PIN to access Voicemail?
- ▶ How to access my Voicemail Sub-mailboxes?
- ▶ How do I retrieve, save or delete messages with my new Neighborhood Voicemail?
- ▶ Can I change my Voicemail account settings?
- ▶ Can I turn my Neighborhood Voicemail off?
- ▶ What features come with my Neighborhood account?
- ▶ How do I use my features?
- ▶ What if I don't want one of the features that automatically come as part of my Neighborhood calling plan?

### **Questions about taxes and surcharges**

- ▶ What kind of taxes will I pay?
- ▶ What is a surcharge and why do I have to pay it?
- ▶ Why do my taxes and surcharges seem different than those with my former phone carrier?
- ▶ Do I have to pay the entire monthly fee if I signed up for the Neighborhood mid-month?
- ▶ Why am I still receiving bills from my former phone carrier?
- ▶ Why do I see charges from my previous MCI plan on this bill?

#### **Is there a number I can call to get help signing up for The Neighborhood?**

If you need assistance joining The Neighborhood online, or you're moving and have questions about getting service for your new home, call 1-877-777-6271.

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#### **What does The Neighborhood offer that my local provider doesn't?**

The Neighborhood is different because it offers:

**Does high speed Internet service provide a dynamic or static IP address?**

High speed Internet service provides a dynamic IP address. This product does not offer a static IP address at this time.

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**Does high speed Internet service include Firewall or Anti-Virus software?**

High speed Internet service with AOL Internet Service Provider does include Firewall and Anti-Virus software. If you choose MCI Internet Service Provider and require these applications, you will need to purchase them separately.

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**Can I order high speed Internet service without local service?**

No, you must have local service with The Neighborhood in order to be eligible for high speed Internet service.

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**Is there a separate high speed Internet service agreement?**

Yes, there is a 12 month service agreement required. If you cancel your high speed Internet service prior to the end of your 12 month service agreement, you will be charged an equipment fee of \$150. To be credited the equipment fee, you must return the equipment in good working order to MCI within 30 days of cancellation.

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**Am I always connected to the Internet?**

Yes, high speed Internet service gives you a constant, dedicated connection between your computer and your phone network. There's no more dialing in, no more waiting to get online, no more busy signals. "Always on" means the Internet is always active and just a click away.

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**Will I get busy signals when trying to connect to the Internet?**

You will never get busy signals with high speed Internet service because there is no dialing involved.

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